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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 528

UNITED STATES OF AMERICA, EX REL.
TENNESSEE VALLEY AUTHORITY,
Petitioner,

vs.

S. COLUMBUS WELCH

BRIEF FOR RESPONDENT

McKINLEY EDWARDS,
Counsel for Respondent.

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BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Circuit Court of Appeals, consolidated cases (R. 201-210), is reported in 150 Fed. (2) 613. The opinions of the District Court (R. 12-21) are not reported. The opinion of the District Court appears in the Record at page 12.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on July 21, 1945 (R. 210-211, 212-214, 215, 216, 217, 218 and 219), the judgment in this respondent's case (R. 210). The jurisdiction of this court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. A., Section 347).

Question Presented

Can the petitioner take the entire tract of this respondent's land consisting of 163 acres when the judgment of the District Court, from which petitioner prosecutes an appeal, requires respondent to execute a general warranty deed, without compensation, conveying to petitioner all that portion of said tract of land lying below the level of the reservoir including all lands to be submerged by the impounded waters of the Fontana Dam, and when said judgment also requires respondent to execute a deed of release, releasing all claims for damage to any of his said lands caused by the construction and operation of the Fontana Dam and reservoir, and also releasing the Petitioner, the State of North Carolina, and all its political subdivisions, of and from all obligations, liabilities, claims and damages of every nature, whether now or hereafter existing, on account of the loss, destruction and impairment of a means of access or access facilities, forever releasing the State of North Carolina, and any of its political subdivisions from furnishing or providing any roads or means of access to any of said lands. Said judgment of the District Court requiring the execution of said deed and release deed having been made and entered agreeably to the answer filed by respondent in this cause and the testimony of said respondent upon the hearing in the District Court.

Statute Involved

The Tennessee Valley Authority Act of 1933, with its several amendments (48 Stat. 58, 49 Stat. 1075, 53 Stat. 1083, 54 Stat. 611, 55 Stat. 575, 599—16 U. S. C. A., Chapter 12A) is quoted in full in R. 107-159.

Statement

The petition of petitioner filed in the District Court seeks to condemn a tract of land owned by respondent and designated in said petition as tract FR-1092 containing 163 acres, more or less. The petitioner also asks in said petition to condemn an undivided one-half interest owned by respondent in tract No. FR-141 (T. R. Vol. 1, p. 1, par. VII of the petition).

The answer of respondent filed in the District Court (T. R. Vol. 1, p. 97) does not resist the taking by petitioner of respondent's interest in tract No. FR-141, but does resist the taking by petitioner of tract FR-1092, except that portion of said tract submerged by the impounded water of the Fontana Dam (which is less than two acres of said tract), and as to this part of said tract, respondent, in his answer, offers to execute to petitioner a general warranty deed, without compensation, and also agrees to execute a release deed releasing petitioner, the State of North Carolina and all its political subdivisions from all claims for damage that may occur to said tract of land on account of the construction and operation of the Fontana Dam, also agreeing to release petitioner, the State of North Carolina and all its political subdivisions, of, and from any and all claims now, or in the future, by reason of the loss of access or road facilities of any kind to said land.

The judgment of the District Court requires the execution by respondent of said deed to the petitioner and also the execution of said release deed.[1]

The District Court found that the land owned by the respondent, S. Columbus Welch, referred to in the petition and answer as tract No. FR-1092, except that part of same lying below the level of said reservoir, bears no physical

[1] See judgment of the District Court (R. 1-3).

relation to the Fontana Project, and is not necessary for the construction, operation or maintenance of the Fontana Dam, or anything connected with the Fontana Project. The construction of a road or means of access to said tract of land is not required, and the furnishing of any means of access thereto is eliminated. That no part of said tract No. FR-1092 is taken by petitioner for public use, other than the acre and a half, or such portion as lies below the level of the reservoir, which said acre and a half, or said portion, respondent will convey to the United States of America.[2]

In the handling of the problems with which the petitioner was confronted, in connection with the Fontana Project, and in dealing with landowners owning land within the reservoir area and adjacent thereto, the petitioner accepted from North Carolina Exporation Company, a large landowner, a deed conveying to the United States of America, flowage easement rights in and over a portion of land containing 389 acres, more or less, said deed also released, acquitted and discharged the Tennessee Valley Authority, its successors and assigns and its agents and employees, and the United States of America, of and from all obligations, liabilities, claims and demands of every nature, character, and description, whether now or hereafter existing, arising out of or in any way connected with any loss, damage, interference, impairment of the efficiency, value, usability or convenience, or injury resulting to the property described in said deed, or to any other property owned by the grantor in the Fontana Reservoir area, including the loss, destruction and impairment of all means of access and access facilities of every description, which extended to, included and relieved from any responsibility in connection therewith, the State of North Carolina, and Swain County, North Carolina. Over 300 acres of the North Caro-

[2] (R. 19—Finding of Fact 35 and 36.)

lina Exploration Company land, according to recitals in said deed, lying below elevation 1,715.63.[3]

In the contract between Tennessee Valley Authority, the State of North Carolina, Swain County and the United States Department of the Interior dated 30th day of July, 1943, the lands of North Carolina Exploration Company, designated therein as approximately 1920 acres, more or less, are excepted and excluded from the area and boundary described in said contract, which area and boundary included all lands, lying in Swain County, North Carolina, on the North side of the Little Tennessee and Tuckaseegee Rivers, and South of the Great Smoky Mountains National Park, extending from Twenty Mile Ridge on the West side to the divide between Lands Creek and Peachtree Creek on the East, the East boundary of the area being approximately two miles west of Bryson City, North Carolina.[4]

The lands of this respondent, which petitioner seeks to condemn, are located within the same area as the lands of North Carolina Exploration Company with reference to the large boundary mentioned in the contract between Tennessee Valley Authority, State of North Carolina, Swain County, and the United States Department of the Interior.[5]

The release deed which respondent offers to execute and which the judgment of the District Court requires respondent to execute (R. 1-3), is to certain provisions, stipulations, and recitals identical with reference to a release of easement rights in roads and highways as that contained in the deed accepted by petitioner from North Carolina Exploration Company. The land of respondent to be sub-

[3] See (R. 113-123), contract between North Carolina Exploration Company and the United States of America dated 12th day of May, 1944.

[4] See agreement between Tennessee Valley Authority, State of North Carolina, Swain County, and the United States Department of the Interior (R. 99-113).

[5] See petitioner's exhibits 3 and 4 (R. maps attached to Record).

merged by the impounded water of the Fontana Dam is to be conveyed in fee to petitioner.

Summary of Argument

I

Whether the purpose of a taking is a public one is ultimately a judicial question.

II

The uses for which petitioner seeks to take the land of this respondent are not public uses authorized by law.

III

The taking by petitioner of this respondent's entire tract of land would deny him the equal protection of the laws

ARGUMENT

I

Whether the purpose of a taking is a public one is ultimately a judicial question.

It is not for Congress, or its delegated agency, to say what is a public use or how far the power of eminent domain may go, but it is for the Courts to say under the constitutional limitation of the Fifth Amendment to the Federal Constitution.

Hairston v. *Danville & W. R. Co.*, 208 U. S. 598, 606, 52 L. Ed. 637, 640; *Sears* v. *Akron*, 246 U. S. 242, 251, 62 L. Ed. 688; *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 705, 67 L. Ed. 1186, 1191, 43 Sup. Ct. Rep. 689; *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, 66, 70 L. Ed. 162, 165; *Cincinnati* v. *Vester*, 33 F. (2) 242, 68 A. L. R. 831, 835, aff'd 281 U. S. 439, 446; see also annotation in 68 A. L. R.

In *Hairston* v. *Danville and W. R. C.*, *supra*, this Court said:

> But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question.

The case of *U. S.* v. *Meyer*, 113 F. (2) 387, cert. denied, 311 U. S. 706, is one of the cases cited and relied on in petitioner's brief. This case involved the Rivers and Harbors Act of April 24, 1888, c. 194, 25 Stat. 94, 33 U. S. C. Sec. 591, which authorizes the Secretary of War to acquire by condemnation any land needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law. In this (*Meyer*) case the defendants resisted the taking of the fee to the lands, contending that the fee was not sought in good faith and not necessary for the accomplishment of the project, also contending that a flowage easement was sufficient. The question decided in the *Meyer* case is that where the Secretary of War was authorized to take private property for a public use that the question of necessity of taking the fee simple title, or the question of taking only a flowage easement was for the Secretary of War to decide. The opinion of the Court in the *Meyer* case is not in conflict with the position taken by this respondent in the instant case. Here this respondent denies that any part of his land or any interest therein, either the fee or an easement is taken for public use, other than that part of same which the judgment of the District Court requires to be conveyed to the petitioner, together with a release

deed to petitioner and the State of North Carolina and all its political subdivisions.

In the case of *Cincinnati* v. *Vester* (*supra*), this Court considered a resolution passed by the City Council of Cincinnati directing the taking of a strip of land in addition to the land taken for a public street and this Court held that notwithstanding said resolution passed pursuant to legislative authority the portion of land not required for the public street was not a taking for public use, and denied the right of the City of Cincinnati to take the same against the will of the owner, the Court saying:

> Under the provision of the Constitution of Ohio for excess condemnation when a city acquired property for public use, it would seem to be clear that a mere statement by the Council that the excess condemnation is in furtherance of such use would not be conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital. This would be to treat the constitutional provisions as giving such a sweeping authority to municipalities as to make nugatory the expressed condition upon which the authority is granted. * * * It is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation. Under the guise of an excess condemnation pursuant to the authority of the constitutional provisions of Ohio, private property could not be taken for some independent and undisclosed public use.

The wording of the resolution passed by the City Council of the City of Cincinnati in the *Vester* case, *supra*, is similar to the wording of the resolution of the Board of Directors of the Tennessee Valley Authority in the instant case. The opinion of the Court in the *Vester* case, *supra*, points out that private property cannot be taken against

the will of the owner simply by a resolution passed by a legislative agency. Regardless of the resolution, or the good faith in the passing of the resolution, the Courts can review and say whether the purpose of the taking is a taking for public use.

Petitioner argues in its brief that the decision below is conflicting with the decisions of this Court in *Rindge Co. v. Los Angeles County*, 262 U. S. 700, 708, 710; *Joslin Co. v. Providence*, 262 U. S. 668; *Bragg v. Weaver*, 251 U. S. 57; *Sears v. Akron*, 246 U. S. 242; *Shoemaker v. United States*, 147 U. S. 282; and *United States v. Gettysburg Electric Ry.*, 160 U. S. 668.

In the *Rindge Co. v. L. A. County* case, *supra*, lands were sought to be condemned for use as public highways. This Court held the fundamental questions involved were, whether the uses for which these lands have been taken are public uses authorized by law; and whether the taking was necessary to such uses.

A finding that the lands of Plaintiffs in Error, in the *Rindge* case were actually necessary for use as a public highway made, by the local and appellate State courts; and this Court held that it would not disturb those findings. In the instant case the District Court found that the lands of this respondent, other than the 1.6 acres, or whatever portion below the level of the reservoir, bear no physical relation to the Fontana Project, and that no part of said tract FR-1092 is taken by petitioner for "public use", other than the acre and a half or such portion as lies below the level of said reservoir (R. 19).

Bragg v. Weaver, 251 U. S. 57, involved the taking of earth to be used in repairing a public highway. The taking was authorized by a Virginia statute for a "public use". The difference in the *Weaver* case, *supra*, and the instant case is that none of this respondent's land sought to be taken, other than the part to be flooded (about which there

is no controversy), is to be used for any purpose in connection with the Fontana Project.

Sears v. *Akron, supra*, holds that the determination of the necessity for taking land for "public use" is a legislative function. This Court saying:

> It is well settled that while the question whether the purpose of a taking is a public one is judicial, the necessity and the proper extent of a taking is a legislative question.

It appears that there is a distinction in making a determination of the necessity or the extent of the taking of a parcel of land for "public use" and in making a decision of what is taken for the purpose of a public use.

In *Shoemaker* v. *U. S.*, 147 U. S. 282, it is held that the determination, whether the use proposed to be made of private property is a "public use" is a judicial function; and that if the question be decided in the affirmative the extent to which such property shall be taken for such use is for the legislature to decide.

II

The uses for which petitioner seeks to take the land of this respondent are not public uses authorized by law.

At pp. 37, 38 of the brief of petitioner it is said:

> Petitioner does not contend that it could condemn respondent's lands in order to turn them over to the Park Service. They are not being condemned for that purpose. If the lands had not been adjacent to the Park, it would equally have been necessary for petitioner to acquire them so that they could be retired from private ownership. * * * The factors necessitating acquisition of the land were the difficulty of replacing the road and the impracticability of leaving the lands in private ownership without access. * * *

From this statement in petitioner's brief it would seem that one of the main purposes for seeking to take the lands of respondent is on account of highway 288 being destroyed by the impounded water of the Fontana Dam, thus taking away the right of access to said lands.

A complete answer made by this respondent to this question, is that, he releases all rights and claims for any loss of roads or access facilities to any of his said lands, and that the judgment of the District Court requires that he execute a release deed, releasing, acquitting, and discharging Tennessee Valley Authority, its successors and assigns, and its agents and employees; the United States of America; the State of North Carolina; the State Highway & Public Works Commission of North Carolina; and Swain County, North Carolina; of and from all obligations, liabilities, claims and damages of every nature, character or description, whether now or hereafter existing, arising out of or in any way connected with any loss, damage, interference, impairment of the efficiency, value, usability or convenience or injury resulting to the lands owned by respondent and designated in the petition as tract No. FR-1092, as fully described by metes and bounds in said petition, and to any other lands owned by respondent within the reservoir area of the Fontana Dam, where such loss, damage, interference, impairment, or injury is or may be alleged or claimed to have resulted from, or to be in any way connected with the construction of said Fontana Dam or the creation or operation of Fontana reservoir, including but not limited to:

(a) The loss, destruction and impairment of a means of access and access facilities of every description which shall extend to, include and relieve from any responsibility in connection therewith, the said State of North Carolina and all its political subdivisions;

(b) Loss, damage, impairment, interference or injury to the property described in the petition, forever releasing the State of North Carolina and any of its political subdivisions from furnishing or providing any roads or means of access whatever to any of said lands owned by respondent described and set out in the petition filed herein (R. 2, 3).

State Highway 288 does not run through the lands of this respondent. Petitioner's exhibit No. 3 shows the lands in question, the reservoir pool, also the location of highway 288, shown in red (R. 30, 31).

A landowner can release his easement in a highway.

Hiatt v. *Greensboro*, 201 N. C. 515, 522;
9 R. C. L. p. 810.

At page 38 of petitioner's brief it is suggested that the expense factor alone would support the government's action in condemning the lands of the respondents, citing *Old Dominion Land Company* v. *United States*, 269 U. S. 55.

Mr. Justice Holmes, in writing the opinion for the Court in the *Old Dominion Land Company* case, said:

> But it is said that the taking was not for a public use, because it is said that the Secretary of War at least was thinking not of a future use of the land by the public or the Government but of saving the country from the loss of the buildings. We shall not inquire whether this purpose was or was not so reasonably incidental to the necessarily hurried transactions during the war as to warrant the taking, upon the principle ill ustrated by Brown v. U. S. 263 U. S. 78. • • • but the military purposes mentioned at least may have been entertained and they clearly were for a public use.

However, if the opinion of the Court in the *Old Dominion* case is authority for the taking of private property in order

to lessen Government expenditure, such authority does not militate against the position taken in the case at bar by this respondent, for the reason that this respondent, in conformity with his answer and testimony in the District Court and also in conformity with the judgment of the District Court in his case, makes a conveyance to the United States of America, without compensation for that part of his land below the level of the reservoir and releases all rights or claims to any easement in State Highway 288 or any road facilities whatever. This is a saving to the petitioner, instead of an expense.

When this respondent agreed to make no claim against petitioner, the State of North Carolina or the County of Swain on account of the taking of Highway 288 or any access road leading to his property, he relieved the petitioner, the State and County of any and all reasons for the taking of said property, and said land then is as far removed from any connection with the Fontana Project as if it was located in a state other than either North Carolina or Tennessee, legally speaking.

When Highway 288 or any access road leading to the property of S. Columbus Welch is eliminated, then, there is no sound legal reason that can be suggested for petitioner to acquire said property. If no sound reason exists, then the taking is not for public use. It is here reiterated that this respondent, by his answer and testimony, has completely and forever removed his tract of land in question in the case at bar from Highway 288 or any other road, and by the deed and release instrument he binds himself to execute, and which the judgment of the District Court requires to be executed, forever releases the petitioner, State of North Carolina and County of Swain from furnishing road access to said tract of land.

Petitioner relies to some extent on the case of *Brown* v. *United States*, 263 U. S. 78. The opinion of this Court in the

Brown case is in no way in conflict with the position taken by this respondent. In the *Brown* case Congress specifically authorized the taking of suitable land for a new townsite to replace the portion of the town of American Falls which would be flooded by the reservoir of the Minidoka project. The land was there taken to replace a town and streets which would be flooded. In the case at bar petitioner is not taking any land or property from the United States Department of the Interior, and, therefore, is under no obligation to replace or provide any lands for said Department of the Interior to be used for a National Park. The petitioner does not seek to take any land from this respondent to replace State Highway 288 or any other road. The attempted taking of this respondent's land with the admitted purpose of later transferring same to the United States Department of the Interior shows that said land is not required for any use whatever in connection with the Fontana Project, and, therefore, is not an authorized taking for public use.

> It is generally the province of the Court to determine the preliminary questions of the right to condemn, whether the use is a public one, and the necessity of taking * * * (20 C. J. p. 974, Section 381).
>
> The burden of proof rests upon the one having the affirmative of the issue. * * * thus the burden is on the petitioner to show all facts necessary to its right to condemn, and to prove all averments made by it in the petition which have been brought into issue (20 C. J. p. 976, Section 382).

The well considered decisions of the courts, both State and Federal, hold that the burden of the issue never shifts, but always remains with the one who holds the affirmative. *Prima facie* or presumptive evidence does not, of itself,

establish the fact or facts upon which the decision of the court or verdict of the jury must rest.

Sweeney v. *Erving*, 228 U. S. 233, 57 L. Ed. 815;
State v. *Wilkerson*, 164 N. C. 432.

Another case sustaining the position taken by this respondent and comparable is *Richmond* v. *Carbical*, 129 Va. 388, 106 S. E. 403, 14 A. L. R. 1341 and note at 1350.

III

The taking by petitioner of this respondent's entire tract of land would deny him the equal protection of the laws.

The argument advanced here is with reference to the contract made by the petitioner with North Carolina Exploration Company (R. 113-123), whereby petitioner accepted from said Exploration Company a deed for flowage easement and release of and from the taking of roads and road access facilities, and, thereby, permits a boundary of land containing approximately 1920 acres, more or less, to remain in private ownership. The North Carolina Exploration Company lands bear the same relation to the Fontana Project as do the lands of this respondent. By comparison of the wording and language of said instrument executed by North Carolina Exploration Company and accepted by petitioner, with the wording and language used in the answer of this respondent filed in the District Court, and also contained in the judgment of the District Court, with reference to releasing all claims for damages on account of the construction and operation of the Fontana Dam, and in connection with the loss of roads and access facilities, we find almost identical words and language, certainyl the same legal construction.

In the case of *Connoly* v. *Union Sewer Pipe Co.*, 184 U. S. 541, 559, 46 L. Ed. 679, 689; the Court said:

> No rule can be formulated that will cover every case. But upon this general question we have said that guaranty of the equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

In the case of *Yick Wo* v. *Hopkins* decided by the Supreme Court of the United States and reported in 118 U. S. 356 (118 L. Ed. 220), we find the following apt statement of the law:

> When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.

It would seem that the guaranty of "equal protection of the laws" would require a government agency, in the conduct of its affairs, to treat all citizens and all landowners alike with reference their civil and property rights.

It is stated in petitioner's brief, p. 35, note:

> The opposition of respondents to the taking of the fee in their properties is not based on any desire to retain their lands in the condition in which they have been left. It is clearly based on the hope that the National Park Service will accept the other lands acquired by petitioner and construct a highway to serve their properties, thus according to them a preferential treatment denied to the other landowners.

This respondent is asking for no preferential treatment, but to the contrary that he have the same privilege that peti-

tioner has already granted North Carolina Exploration Company.

A witness for petitioner, F. W. Webster, testified (R. 97), that one method of the Tennessee Valley Authority in dealing with landowners was to accept releases about a road or an access road to their property.

The judgment of the District Court, in this respondent's case (R. 1-3), from which petitioner prosecutes an appeal, requires this respondent to execute:

> (a) deed, with full covenants of warranty, conveying all of the lands contained in the description of said tract No. FR-1092 located and lying below said reservoir. The description in said deed shall cover all the land owned by the respondent which is to be submerged by water impounded by the Fontana Dam.
>
> (b) deed of release, releasing, acquitting, and discharging Tennessee Valley Authority, its successors and assigns, and its agents and employees; the United States of America; the State of North Carolina; the State Highway and Public Works Commission of North Carolina; and Swain County, North Carolina; of and from all obligations, liabilities, claims, and damages of every, nature, character, or description, whether now or hereafter existing, arising out of or in any way connected with any loss, damage, interference, impairment of the efficiency, value, usability or convenience or injury resulting to the lands owned by respondent and designated in the petition as tract No. FR-1092, as fully described by metes and bounds in said petition, and to any other lands owned by respondent within the reservoir area of the Fontana Dam, where such loss, damage, interference, impairment, or injury is or may be alleged or claimed to have resulted from, or to be in any way connected with the construction of said Fontana Dam or the creation

or operation of Fontana Reservoir, including but not limited to:

(a) The loss, destruction, and impairment of a means of access and access facilities of every description which shall extend to, include and relieve from any responsibility in connection therewith, the said State of North Carolina, and all its political subdivisions;

(b) Loss, damage, impairment, interference, or injury to the property described in the petition, forever releasing the State of North Carolina and any of its *political* subdivisions from furnishing or providing any roads or means of access whatever to any of said lands owned by respondent described and set out in the petition filed herein.

It is ordered, adjudged, and decreed that S. Columbus Welch, respondent, his heirs, assigns, executors, or administrators, upon notice or demand forthwith execute and deliver unto the State of North Carolina and/or the United States Department of the Interior a deed for a right of way over any of the lands of respondent referred to as tract No. FR-1092, for the construction and maintenance of a road or highway through and over any of said lands, said right of way to be and include such width as the said State of North Carolina, and/or United States Department of the Interior is acquiring and using through and over adjacent lands for said road purposes, with the right on the part of the State and/or United States Department of the Interior to restrict the use of said road or highway for commercial traffic; and said land of respondent, S. Columbus Welch, is burdened with the future possibility of said easement.

It is submitted that the position of this respondent in no way interferes with the contract petitioner made with the State of North Carolina and the County of Swain, since it appears that the reason of said contract was to eliminate

any responsibility in connection with State Highway 288, and possibly any other road leading to respondent's land. This statement, however, does not concede that this respondent is in any way bound by a contract to which he is not a party.

In the contract referred to in the preceding statement, the following provision is made:

> The Authority shall not be responsible and shall incur no liability under this section for any delay or delays in the acquisition of title to any of said land caused by or attributable to title searches or other studies, condemnation proceedings or other litigation, or caused by or attributable to any act or circumstance which is incident to or reasonably related to such acquisition or which is beyond the Authority's control, it being the intention of the parties that the Authority shall incur no liability for any delays in the acquisition of any land under this section resulting from any cause whatsoever other than the willful failure or refusal of the Authority to take any step necessary to effect such acquisition.[6]

There is some suggestion in petitioner's brief about taking the lands in question out of private ownership on account of relieving the State and County of furnishing police protection. It is submitted that the Tennessee Valley Authority Act of 1933, as amended, does not confer upon the Tennessee Valley Authority the authority to take over the police powers of the country. It is further suggested that it would be no more difficult to police the 163-acre tract of this respondent's land, than to police the large boundary of the North Carolina Exploration Company land.

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[6] See agreement dated 30th day of July, 1943, between Tennessee Valley Authority, State of North Carolina, Swain County, and United States Department of the Interior (R. 99-113, at top of page 104).

Conclusion

For the reasons given, the decisions of the court below in this respondent's case should be affirmed.

Respectfully submitted,

McKinley Edwards,
Attorney for Appellee.
S. Columbus Welch.

APPENDIX TO BRIEF FOR RESPONDENT, S. COLUMBUS WELCH

TESTIMONY BEFORE THE DISTRICT COURT

Robert E. Frierson, for Petitioner.

On cross-examination.

Q. Mr. Frierson, I believe you just have a map there before you now that has been offered in evidence and handed up to the Court that shows tract FR-1092?

A. Yes, sir.

Q. You have that map with you do you?

A. Yes, sir.

Q. Now, Mr. Frierson, the impounded waters on the Fontana Dam only cover about a tenth of an acre of that land, a little down at the lower tip, isn't it?

A. About an acre and a half.

Q. You mean you flood an acre and a half?

A. An acre and six-tenths to be exact, the way we figure it.

Q. You measured that?

A. Yes, sir.

Q. And that's the part that the respondent agrees to make a deed to the government for. You understand that, don't you?

A. I understand you to say so, sir. (Tr., 54-55)[7]

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Q. Now, they don't intend to keep that land. The T. V. A. doesn't intend to keep that boundary of land or to use that boundary of land in connection with the Fontana Dam, does it?

A. No; they don't intend to keep it.

Q. Now, they are going to let somebody else have it. That's true, isn't it?

A. That's correct. (Tr., 61).

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[7] "Tr." refers to the paging of the transcript in Volume II of the record.

By the Court:

Q. Was that the understanding between the T. V. A. and the Park Service, that you should condemn or buy this land and then transfer it to the Park, Mr. Frierson? Was that the understanding?

A. Yes, sir. (Tr., 63).

Frank W. Webster, for Petitioner.

On cross-examination.

Q. Mr. Webster, you stated that in your experience with the T. V. A. in acquiring lands for roads, that one method they had was taking releases on property. Now, you do know that the T. V. A. has accepted releases *from* land owners about a road or an access road to their property?

A. Yes, sir.

Q. And they consider that good—Now as a matter of fact, it has been introduced, Your Honor, in evidence, this contract—I will ask you, are you acquainted with this contract that you told His Honor about between the Government and the T. V. A. and the Interior Department?

A. Yes.

Q. You have read it?

A. Yes, sir.

Q. Well, now Mr. Webster, you know that in the contract there is excepted a boundary of land of about 1,000 acres within this area that you are talking about, within the 44,000 acres——

The Court: 44,000 acres.

Within the 44,000 acres, that the T. V. A. is not required to get and turn over to the Park.

A. Yes, sir.

Q. Now, that is the land of the North Carolina Exploration Company?

A. Yes, sir. (Tr., 103-104).

S. Columbus Welch, Respondent.

On direct examination.

Q. Now, Mr. Welch, in the pleadings that I have filed for you as your attorney in this Court, which you are acquainted with, it is stated that you will release the state, county and government from any and all damage on account of closing a road or a way to get to your property.

A. That's right.

Q. You are willing to that?

A. Yes, sir.

Q. You will do that. It is further stated in the pleadings that about an acre or a quarter of an acre of Tract 1062 that is flooded by water, that you will make a deed——

A. Yes, sir.

Q. To the United States Government, free.

A. *Free.*

Q. Deed them every bit of it. That in addition, you will execute any kind of a deed or instrument or authorize the Court in a judgment to release and relieve the United States Government, Tennessee Valley Authority, the State of North Carolina and the County of Swain, from any and all damage by reason of flooding a road or your access to this property?

A. Yes, sir.

Q. You further agree, Mr. Welch, by an amendment to your answer that I filed by permission of Court today, to give and grant to the Department of the Interior, United States Department of the Interior, the United States Government, or the state, a right of way to build a road over this tract of land containing 163 acres?

A. Yes, sir.

Q. You will convey them that, you will agree that it be put in the judgment, you will do it free and without any charge?

A. Yes, sir. (Tr., 184-186).

Cross-examination.

Q. Mr. Welch, do you understand that if you keep this property and the reservoir comes up, that you will have no way of getting to it or out of it by road at all? Do you understand that?

A. Yes; I understand that there won't be no road through it.

Q. And do you also understand that you have no way of getting a road built to that property in the future?

A. No; I don't know of any.

Q. Well, are you relying upon some assumption that you are going to get a road built to that property if you keep it?

A. Well, I can get into it, I think.

Q. Well, now, just how?

A. Well, I can get into it on the water.

Q. Do you know anything about the drawdown in that lake, that is, difference in the water level in that lake in different seasons of the year?

A. I don't——

Q. Has anybody explained that to you?

A. Well, it would be lower sometimes than others.

Q. Well, when the lake is way down low, how are you going to get, even by water, back and forth from your property to the lake wtihout going on land that you don't own.

(No answer from the witness.)

Q. You'd have to go on government property, wouldn't you?

A. Yeah.

Q. In order to get there even by water, when the lake is down. So I just want to be sure, do you understand that your situation, if you keep that property, is that you have no road there at all and can only get to it by water if you can get permission to go over property that somebody else owns?

A. Yeah, I understand that.

Q. Now, what are you going to do with that land if you keep it?

A. Well, I want to keep it.

Q. What are you going to do with it?

A. Well, several things I could do with it. (Tr., 191-192).